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IN THE

Supreme Court of the United States

October Term, 1966

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CHARLES S. MURPHY, ET AL., as individuals and as members of the CIVIL AERONAUTICS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, The Flying Tiger Line Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 2, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted at Appendix A, p. 1a below. The opinion of the United States District Court for the District of Columbia is reported at 244 F. Supp. 889 (D.D.C. 1965). The opinion and regulation of the

Civil Aeronautics Board (hereafter referred to as "Part 207") of which Petitioner sought review by the District Court and by the Court of Appeals below are printed in the Board's Economic Regulations and Economic Regulations Preambles (29 Fed. Reg. 13246, 14105; 14 C.F.R. 207). The opinion of the District Court and the opinion and regulation of the Board are reprinted in the Joint Appendix printed for the use of the Court of Appeals (J.A. pp. 15 *et seq.*; 105 *et seq.*).*

JURISDICTION

The judgment of the Court of Appeals (Appendix A, p. 1a below) was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board misconstrued Section 401(e)(6) of the Federal Aviation Act, which authorizes air carriers holding route certificates to perform charter services, in confining this section of the Act to "off-route" charters only, with the result that the Board's Economic Regulation (Part 207) governing charter services imposed an unlawful discrimination between all-cargo carriers and combination carriers in the performance of passenger charters.

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* Nine additional copies of the Joint Appendix have been filed with this Court for use in passing upon the Petition. See Rule 21(3) of the Court's Rules. "J.A." citations are to this Joint Appendix. Petitioner has also filed with this Court all relevant portions of the record made before the Board in the rule-making proceeding that resulted in the issuance of Part 207. This five-volume record was part of the record in the case before the District Court and before the Court of Appeals. Citations thereto appear herein as "Tr. ——."

2. Whether Part 207, issued after a rule-making proceeding under the Board's authority pursuant to Section 401(e)(6) to regulate charter services, so restricts and discriminates against the all-cargo carriers as to destroy the statutory rights to perform charter services that Section 401(e)(6) grants to them.

3. Whether Part 207 should be stricken as arbitrary and capricious because the purported basis and purpose upon which the Board promulgated the regulation is totally unsupported by any information adduced in the rule-making proceeding.

4. Whether the Board, or any administrative agency, may take action based upon a rule-making proceeding alone to deprive common carriers holding certificates of public convenience and necessity of rights that the governing regulatory statute incorporates into those certificates, when the statute provides that a certificate can be amended or modified only upon specific findings by the agency after notice and an evidentiary hearing.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act, the Motor Carrier Act and the Administrative Procedure Act principally involved are set forth in Appendix B, pp. 2a *et seq.* below.

STATEMENT

Transporation services by air carriers may be divided broadly into two major categories: scheduled services and charter services. This case presents important questions of law concerning the regulation by the Civil Aeronautics Board of the second of these major categories of air transportation.

In charter service a carrier employs its aircraft between specific points under contract with specific

parties for specific occasions. Scheduled service, on the other hand, is provided at set times over routes that the Board has awarded to specified carriers—the "route" carriers—under certificates of public convenience and necessity. Passengers and cargo are carried in both categories of service. Charter services are conducted by the "route" carriers as well as by a separate group of "supplemental" carriers who engage in no scheduled services.

Charter services are a large source of revenue for many route carriers. Charter revenues contribute critically to the financial stability and economic viability of one particular group of four relatively small route carriers. These are the all-cargo carriers of whom Petitioner is one.* It is against these carriers that the adverse economic impact of the decisions below strikes heavily. Their certificates grant them routes only for the transport of property and mail and not—as is the case with the certificates of the "combination" carriers—for the transport of passengers as well. Passenger and cargo charter services by the cargo carriers are essential for the economic utilization of their equipment and to enable them to compete effectively

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* One of these, Slick Corporation, received Board approval in August 1965 to suspend its scheduled service because of that carrier's serious financial difficulty. Slick Corporation, Suspension of Scheduled Route Service, Order E-23352 C.A.B. Dkt. No. 16356, March 14, 1966 (continuing suspension). Airlift International, Inc., another all-cargo carrier, and Slick have applied to the Board for the transfer of Slick's certificate to Airlift to enable the latter carrier to operate Slick's route. Application of Airlift International, Inc., and Slick Corporation, C.A.B. Dkt. No. 17622, August 12, 1966. Airlift has so far been denied permanent route authority for the reason, among others, that the Board considers that it, too, is in financial difficulty. Airlift Renewal Proceeding, Order E-24032, C.A.B. Dkt. No. 11749, June 30, 1966; Examiner's Decision, March 22, 1966.

with the cargo operations of the combination carriers.* In 1964, for example, Petitioner's charter services (other than military charters) represented 16% of its total annual revenues, the loss of which would have caused a substantial operating loss for the year (J.A. 54).

In September 1964, following a rule-making proceeding and without an evidentiary hearing, the Civil Aeronautics Board revised Part 207 of its Economic Regulations, which govern the charter services of the route carriers. In describing the proposed regulation, the Board recognized its broad impact on the air transportation industry when it stated: "Part 207 is a major regulatory proposal which could have a significant effect with respect to all classes of carriers."** The Board's statement was amply borne out as to the cargo carriers, for the effect of the revised Part 207 was to deprive them almost entirely of their much-needed charter revenues. The Board thereby placed in serious jeopardy the ability of these carriers to grow and develop in competition with the combination carriers and the supplemental carriers.

To secure judicial review of this alarming action by the Board, Petitioner brought suit in the District Court for declaratory judgment and injunction to set aside key portions of Part 207 and to challenge the

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* See, generally, Schary, P., *Competition, Regulation and the Air Freight Industry*, 30 J. Air L. & Commerce 62, 66 (1964); opinion of dissenting Board Member Gurney in the Part 207 rule-making proceeding (J.A. 40).

** Supplemental Notice of Proposed Rule-Making and Notice of Oral Argument, EDR-48F and PSDR-8D, June 22, 1964 (29 Fed. Reg. 8121).

Board's administrative procedure in promulgating the regulation (J.A. 2 *et seq.*).*

The complaint objected to Part 207 chiefly on the ground that the restraints it imposed on charter services by Petitioner—and by the other all-cargo carriers—so restricted and so discriminated against the carriers as to be openly at odds with the express statutory grant of charter authority contained in the Federal Aviation Act, Section 401(e)(6) of the Act. That section, as amended by Congress in 1962 specifically at the urging of Petitioner, among others, had enlarged the charter authority of the route carriers. P.L. 87-528, 76 Stat. 143. The amendment authorized any such carrier to provide charter services "without regard to . . . the type of service" named in its certificate, thus adding to the route carriers' long-standing authority to conduct charters "without regard to the points named in its certificate."** The language of the 1962 amendment,

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* The district courts and not the courts of appeals have jurisdiction of such a suit in the first instance. The original jurisdiction of the latter is confined to proceedings seeking judicial review by "orders" of the Board. By contrast, "regulations" of the Board, issued after a rule-making proceeding that does not encompass an evidentiary hearing, are reviewable initially in the district courts by a suit for injunctive relief. Arrow Airways v. Civil Aeronautics Board, 87 U.S. App. D.C. 71, 182 F. 2d 705 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 828 (1950); Utah Gas Pipeline Co. v. Federal Power Commission, 86 U.S. App. D.C. 314, 181 F. 2d 796 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 827 (1950); Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. § 1486.

** Section 401(e)(6) reads in its entirety:

> "Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board."

Petitioner believed, authorized the all-cargo carriers to engage in passenger charters as well as cargo charters. That right previously had been denied to them under Section 401(f) of the Civil Aeronautics Act of 1938, the earlier statutory provision governing charter services.

In adopting revised Part 207, the Board (in a 3-2 decision, Members Gurney and Gilliland dissenting) used its power under Section 401(e)(6) to "prescribe regulations" that effectively reversed the action of Congress by continuing, for all practical purposes, the exclusion of passenger charters and limiting drastically even cargo charters by the all-cargo carriers. The Board construed Section 401(e)(6), as it had done previously,* as authorizing only "off-route" charters—that is, between points that are not on a carrier's certificated route (J.A. 16, 22). The Board then proceeded to define passenger charters by the cargo carriers as "off-route" whether or not such a charter was performed over the carrier's certificated route (J.A. 32). In addition, the Board limited each carrier's annual "off-route" charter mileage—whether passenger or cargo (except military charters)—to 2% of its annual total revenue plane miles flown "on-route" in scheduled services.

As a consequence, all passenger charters by the cargo carriers fell within the 2% restriction while passenger charters by combination carriers over their certificated routes were in no way restricted. And the 2% restric-

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* ER-375, March 26, 1963, 28 Fed. Reg. 3078; Notice of Proposed Rule-Making, EDR-48B, January 13, 1964, 29 Fed. Reg. 1476.

tion was calculated for the all-cargo carriers on the basis of their scheduled service miles only, even though these carriers had comparatively little scheduled service mileage. On the other hand, the combination carriers typically had enormous scheduled service traffic and could anticipate year-to-year increases that made the 2% limitation unimportant.*

Under Section 4 of the Administrative Procedure Act (Appendix C, p. 11a), the Board was required to provide a "statement of [Part 207's] basis and purpose." Only one consideration appears from the Board's opinion that could reasonably be cited as the "basis and purpose" of the regulation. The Board stated that its restrictions on charter services by certificated carriers were designed to assure that these carriers "do not place undue emphasis on charter operations in derogation of their obligation to perform adequate scheduled service" (J.A. 17). Yet the Board neither cited in its opinion nor had presented to it in the rule-making proceeding even one instance of threatened or actual deterioration of route service by any certificated carrier as a result of charter operations. Petitioner itself has never been the object of any complaint alleging inadequacy of scheduled service (J.A. 49-50, 55).

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* The Board also authorized the all-cargo carriers to conduct unrestricted cargo charter services in their "designated geographic area of service [or operations]" (J.A. 22). For Petitioner, the Board determined this area to be the contiguous 48 states, but it also awarded this "area of operations" to two of the other all-cargo carriers. Apparently because no U.S. all-cargo carriers are certificated for the Pacific, Africa, Middle East and South Asia areas, the Board neglected these "areas of operations." Cargo charters in these areas accordingly remain "off-route" and are subject to the 2% restriction.

No economic or industry analysis or other expressions of administrative expertise supported the Board's attempted explanation of the 2% restriction—except that this figure represented a "historical balance between the route carriers' route [scheduled] services and off-route charters" (J.A. 18). Nothing appears in the opinion to suggest that the Board considered other reasonable alternatives. Nowhere did the Board consider the adverse impact the 2% restriction would have on the ability of the all-cargo carriers to use their operating equipment effectively and economically. No justification was given for the uneven, crippling effect of the 2% restriction on the cargo carriers as compared to its bland impact on their major cargo competitors, the combination carriers.

Petitioner's complaint in the District Court sought to set aside the crippling provisions of Part 207 on several grounds. Petitioner asserted: (1) that the Board lacked statutory authority to restrict passenger charters by cargo carriers over their certificated routes without similarly restricting the combination carriers (J.A. 6-7); and (2) that the 2% limitation imposed by the Board was tantamount to a proscription of all charter services by the cargo carriers, such as Petitioner, whose "economic survival in the immediate future is directly dependent upon continuation of revenues from such charter operations" (J.A. 11). It was further alleged that no information was presented in the rule-making proceeding that bore any reasonable relationship to the Board's stated "basis and purpose" in promulgating Part 207, and that the regulation accordingly should be enjoined as arbitrary and capricious for this separate reason (J.A. 8-10).

The complaint also asserted that Part 207 was invalidly issued on the independent ground that the regulation effected modifications in Petitioner's certificate of public convenience and necessity which could lawfully be brought about only by an adjudicatory proceeding, as provided for by Section 401(g) of the Aviation Act (49 U.S.C. § 1371(g)). This section contemplates the holding of an evidentiary hearing and the creation of a formal record of witness and documentary evidence that will permit effective judicial review of agency action. Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006. The route carriers, including Petitioner, voiced these objections to the Board in the course of the rule-making proceeding (J.A. 19-20; Tr. 1436).

Petitioner's objection to the administrative procedures followed by the Board presents a question that is on all fours with the chief question now being presented by other petitioners in this Court—certain combination carriers—in a related case decided by the court below *en banc, American Airlines, et al.* v. *Civil Aeronautics Board* (Nos. 18,833, 18,834, 18,840, U.S. App. D.C. 1966), No. 304, October Term, 1966 (petition for writ of certiorari filed June 30, 1966). That petition asks the Court to review, *inter alia*, whether the Board should have held an evidentiary hearing prior to the issuance of Part 399, a Board "Policy Statement" having essentially the effect of a regulation, that authorized the use of certain cargo tariffs, known as "blocked space" tariffs, by the all-cargo carriers but denied these tariffs to the combination carriers. The Board's Policy Statement on "blocked space" and its revised Part 207 regulation governing charter services were promulgated as a consequence of the same rule-making pro-

ceeding; there was a common notice of proposed rule-making, a joint hearing and a joint record.*

The District Court rejected Petitioner's challenges to Part 207 and to the administrative procedure followed by the Board. Granting the Board's motion to dismiss the complaint, the court ruled that Part 207 did not exceed the Board's statutory authority under Section 401(e)(6) of the Aviation Act to "prescribe limitations and qualifications" on charter services. (J.A. 109); that because Part 207 affected an entire class of air carriers rather than particular members, an adjudicatory hearing was unnecessary (J.A. 109); and that Part 207 did not discriminate against the all-cargo carriers but only created a reasonable classification as between them and other carriers (J.A. 110). In treating Petitioner's claim that no information had been adduced in the rule-making proceeding that could sustain Part 207's stated "basis and purpose," the District Court appeared to conclude that no such information was required, although its opinion is unclear on this point (J.A. 110).

The Court of Appeals affirmed the judgment of the District Court in a *per curiam* opinion (Appendix A, p. 1a below) stating that it was "in general agreement" with the opinion of the District Court. In disposing of Petitioner's contention that Part 207 had been invalidly issued absent an adjudicatory hearing, the court cited its decision in the "blocked space" case (see p. 10 above).

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* See Notice of Proposed Rule-Making, EDR-48, November 13, 1962, 27 Fed. Reg. 11322 (Tr. 8-11); Notice of Proposed Rule-Making, EDR-48B and PSDR-8, January 13, 1964, 29 Fed. Reg. 1476 (Tr. 182-198).

REASONS FOR GRANTING THE WRIT

The Civil Aeronautics Board's revised Part 207 will have far-reaching significance in shaping the extent and nature of charter service by United States air carriers in coming years by fixing the rights of the cargo, combination and supplemental carriers to compete in this important market. In promulgating Part 207, the Board acted on the basis of its reading of the provision of the Federal Aviation Act—Section 401(e)(6)—that delineates the scope of the Board's power to regulate this important segment of air transportation. The Court of Appeals and the District Court, in sustaining the Board's reading of the Act, decided an important question of Federal law involving the charter service rights of the different classes of carriers that has not been, but should be, settled by this Court.

Petitioner additionally submits that there exist conflicts with controlling decision of this Court in the rulings by the courts below that Part 207 was within the Board's power to prescribe regulations for charter services, that the Board had before it information adequate to sustain the stated "basis and purpose" for the regulation, and that the Board had properly refused an adjudicatory hearing in connection with the issuance of Part 207.

A. The Board's Narrow Reading of Section 401(e)(6) of the Federal Aviation Act Discriminates Against the All-Cargo Carriers in Favor of the Combination Carriers.

The Board and the all-cargo carriers have long disagreed over whether Section 401(e)(6) of the Aviation Act authorizes the carriers to perform charters over their certificated routes as well as "off-route," or whether the section grants only "off-route" charter

rights. No judicial decision construing the Federal Aviation Act or its predecessor statute, the Civil Aeronautics Act, has passed on this question. Yet the issue is one of significance in the intense competition between the all-cargo carriers and the combination carriers for charter revenues. And it promises to become increasingly important as the all-cargo carriers progressively extend their route structures under certificates that may be awarded in proceedings now pending before the Board.* For in that event, if the Board's reading of Section 401(e)(6) stands, passenger charters over the cargo carriers' new routes will continue to be treated as "off-route" and, therefore, subject to the severe 2% restriction of Part 207.

The Board's position that Section 401(e)(6) is confined to "off-route" charters underlies this major element of Part 207. The Board asserts that the authority of a certificated carrier to conduct "on-route" charters is a part of the bundle of rights the Board grants to a route carrier in its certificate—and does not derive from the statutory authority of Section 401(e)(6). For this reason, the Board concludes, all-cargo carriers, who uniformly lack authority to provide route passenger service, likewise lack authority to conduct passenger charters over their routes except as the Board may determine in regulations, such as Part 207, issued pursuant to Section 401(e)(6).

With this reading of the section, the result, as we have already shown (p. 7 above), is that the 2%

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* There are now pending applications by cargo carriers for major routes between the United States and points in the Pacific Ocean area, Southeast Asia (including India and Pakistan) and Canada.

restriction of Part 207 applies to passenger charters by the cargo carriers over their certificated routes but not to comparable charters of the combination carriers. If, on the other hand, Section 401(e)(6) were construed to grant both on-route and off-route charter authority, the Board could not sustain its distinction between passenger charters by the cargo carriers and by the combination carriers. For in such a case the operative language of Section 401(e)(6)—"without regard to the points named in its certificate, or the type of service provided therein"—would plainly compel the Board to deal even-handedly and without discrimination as between the two major classes of route carriers.

Considerations of statutory construction, precedent and legislative history strongly favor this Court's review of this question of law and the rejection of the view embraced by the Board and by the courts below.

1) The Board's position disregards the inter-relationship between the certificating provisions of the Aviation Act and those provisions—of which Section 401(e)(6) is one—that proscribe the Board from imposing terms and conditions in route certificates. In urging that Section 401(e)(6) embraces only off-route charter operations, the Board presumably would retain to itself, as part of its power to issue route certificates under Section 401(d) or to modify certificates under Section 401(g), the authority to bar a route carrier from conducting charters on-route. But no one—including the Board—has ever suggested that it has such authority. The Board could not, that is, delete from a route certificate the right to conduct on-route charters. The reason, however, is not that the Board is precluded

from doing so by Sections 401(d) or 401(g) of the Act but that Section 401(e)(6) withholds such power from the Board. Section 401(e)(6) itself grants charter authority to the route carriers and permits the Board only to "regulate" the exercise of that authority. The section is comparable in this respect to other portions of Section 401(e) of the Act that limit the Board's authority to impose terms and conditions in certificates. See Section 401(e)(2) (transport of foreign countries' mail); 401(e)(4) (change of schedules, equipment, facilities) (Appendix B, p. 5a below). So construed, Section 401(e)(6) and the certificating provisions of the Act fit together into a unified regulatory scheme.

2) Although no decisions under the Aviation Act illuminate with clarity the meaning of Section 401(e)(6),* a three-judge court in the Judicial Circuit

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* Early decisions of the Board indicated that it construed the predecessor of Section 401(e)(6)—Section 401(f) of the Civil Aeronautics Act of 1938 (Appendix B, p. 11a below)—as the source of authority for charter services by the route carriers. Western Air Corp.—Grandfather Certificates, 1 C.A.B. 39, 42 (1939); Pioneer Air Lines, Inc., 7 C.A.B. 469 (1942). One district court decision construing Section 401(f) stated that charter services by route carriers are "an expressly declared right granted, not by action of the Board, but by law"—that is, by Section 401(f) itself. Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592, 603 (D. Alaska, 1948).

The decision of the Court of Appeals below more than a decade ago in The Flying Tiger Line Inc. v. Civil Aeronautics Board, 92 U.S. App. D.C. 260, 204 F.2d 404 (D.C. Cir. 1953), although also involving the predecessor of Section 401(e)(6), was not concerned with whether the statutory provision embraced on-route as well as off-route charter services. This earlier case is of relevance now only because it clearly established that Section 401(f) did not encompass authority for passenger charters by the all-cargo car-

of the Court of Appeals below has interpreted the correlative provision of the Motor Carrier Act (54 Stat. 919, 49 U.S.C. § 301 *et seq.*) as Petitioner urges Section 401(e)(6) should be construed. Section 208(c) of the Motor Carrier Act, like Section 401(e)(6), appears in the portion of that regulatory statute treating the "terms and conditions of certificate[s]." Section 208 (c) authorizes any certificated motor carrier to transport "to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed" (Appendix B, p. 11a below). *Safeway Trails, Inc.* v. *Interstate Commerce Commission,* 176 F. Supp. 201, 204-05 (D.D.C. 1959), *aff'd per curiam,* 361 U.S. 86 (1960), construed Section 208(c) to be the statutory authority for motor carrier charter services under the Motor Carrier Act. In language that could be applied almost verbatim to the instant proceeding, the court ruled that the section precluded the Interstate Commerce Commission from imposing restrictions on charter services when it issues a route certificate to a motor carrier.

The Civil Aeronautics Act of 1938 was patterned upon the Motor Carrier Act, which had been enacted by Congress only three years earlier. Accordingly, the clear meaning that has been ascribed to Section 208(c) is persuasive in any search for the proper interpretation of Section 401(e)(6), the direct analogue for comparable charter authority in the Aviation Act.

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riers. *Whether* the cargo carriers are entitled to perform passenger charters was definitively settled with the passage of the 1962 Amendment that became Section 401(e)(6) and which contained the words "without regard to . . . the type of service." In dispute now is the equally critical issue of *how and the extent to which* cargo carriers shall be entitled to perform such charters; *i.e.,* whether the Board may cancel the statutory right in the guise of regulation.

3) Finally, the legislative history of the 1962 Amendment to the Aviation Act that became Section 401 (e) (6) indicates that the intent of Congress in enacting the words "without regard to . . . the type of service" was to place cargo carriers on an equal footing with combination carriers in performing charters. Senator Engle, the author of the 1962 Amendment, in a statement to the Senate, declared that the Amendment was intended to *"give to the cargo carriers the same authority enjoyed by passenger carriers in providing charter service of all types, no more and no less"* (emphasis supplied). 108 Cong. Rec. 11426.* This statement was adopted by Senator Monroney (*ibid.*), who was the floor leader in the Senate and who led the Senate conferees in the Committee of Conference which acted on the 1962 amendments for both houses of Congress.

Senator Engle subsequently wrote to the Board's Chairman further elaborating the intent of his amendment with particular reference to the Board's pro-

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* The relevant portion of Senator Engle's statement reads:

"Against heavy odds, the cargo carriers are building an air cargo industry for the United States, without Government subsidy. Their ability to develop this new business and to create new fleets of modern aircraft has been made possible in the main by their charter activities. Without the amendment to Section 401(e) of the Federal Aviation Act which is included in the bill before you, the cargo carriers would be the only carriers who would not be permitted to perform both cargo and passenger operations without applying to the CAB for exemptions. This bill as reported by the committee of conference will correct this situation and will give to the cargo carriers the same authority enjoyed by passenger carriers in providing charter services of all types, no more and no less." 108 Cong. Rec. 11426.

posed Part 207 regulation (J.A. 69-74). He took sharp issue with the Board's reading of Section 401 (e)(6) as confined to off-route charters. The letter expresses in simple and direct terms the deep concern of the author of the 1962 Amendment that the administrative agency was preparing—as it finally did—to use its authority to "regulate" charter service as a means of withholding the passenger charter rights Congress intended the cargo carriers to have. In sum, as Senator Engle feared, the Board has employed its on-route and off-route rationale to read back into Section 401(e)(6) the very discrimination against the cargo carriers that Congress sought to eliminate once and for all.*

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* In the proceedings below, the Board has been hard put to show that Section 401(e)(6) applies only to off-route charters. The Board has cited to a solitary word and no more. That is the word "off-route," which was employed in passing and without exegesis in the portion of the Conference Report treating the 1962 Amendment. See H.R. Conf. Rep. No. 1950, 87th Cong. 2d Sess., p. 12. The Board has also referred to a letter by Senator Cotton to the Board's Chairman (J.A. 103-04). This communication relies largely on the language of the Conference Report and does little more than restate the Board's own off-route and on-route rationale—essentially as we have explained it above (p. 13).

There is no greater merit in the Board's own additional reliance on the Conference Report in the proceedings below to establish that Congress intended to grant the Board discretion in authorizing the cargo carriers to perform passenger charters. In the face of the clear language employed by Senator Engle and embraced by Senator Monroney, the more persuasive view would appear to be that, whatever discretion the Board may have, it is not a discretion to issue regulations governing charters that grievously discriminate between the cargo carriers and the combination carriers.

B. Part 207 so Restricts and Discriminates Against the All-Cargo Carriers as to be Totally Destructive of the Statutory Rights to Perform Charter Services That Section 401(e)(6) Grants to Them.

This Court's decisions have long established that an administrative agency may not deny by rule or regulation what Congress has conferred by statute: The regulations of an agency issued pursuant to the statute it administers must carry out the legislative purposes of Congress—and not amend, alter or modify those purposes as the agency sees fit. See *Miller* v. *United States*, 294 U.S. 435 (1945); *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129 (1935); *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1945); *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107 (1941); *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315 (1924); *International Ry Co.* v. *Davidson*, 257 U.S. 506 (1922).*

Decisions involving the Civil Aeronautics Board are in accord. In *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961), the Court commented that the Board is entirely "a creature of

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* In Manhattan General Equipment Co., *supra*, the Court declared (297 U.S. at p. 134-35):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. . . . And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. . . ."

Congress" and the issue in any proceeding "is not what the Board thinks it should do but what Congress has said it can do." *Cf. Civil Aeronautics Board* v. *Summerfield,* 347 U.S. 924 (1954).

It is beyond any dispute here that Congress intended to authorize the route carriers to perform charter services. It is equally beyond dispute that in the 1962 Amendment to the Aviation Act that became Section 401(e)(6) Congress intended to enlarge the cargo carriers' existing right to perform cargo charters by adding the important further right to perform passenger charters. The sharp dispute in the instant proceeding is over whether the Board has blatantly thwarted these clear legislative purposes by imposing regulations which effectively destroy the charter rights Congress intended the cargo carriers to have.

Even brief analysis discloses that the Board's Part 207 has not "regulated" the charter operations of the all-cargo carriers but has for all practical purposes withdrawn their right to perform charters. The effect of the Board's 2% restriction on off-route charters by these carriers (which of course includes their on-route passenger charters) is devastating. Applied to Petitioner's scheduled service mileage of approximately 5,000,000 miles in 1964, for example, the restriction would preclude Petitioner from performing more than about 100,000 miles of off-route charters in 1965 (J.A. 48). This mileage—assuming it were all applied to passenger charters—would confine Petitioner to one and one-half round-trip coast-to-coast passenger charter flights per month.* Such "regulation" will mean

* This stark result was cited by dissenting Member Gurney. He concluded (J.A. 40): "In effect, this [2%] limitation will preclude the all-cargo carriers from engaging in any passenger business and for this reason [it] is an unreasonable restriction."

that Petitioner cannot retain the bare minimum of employees or services required for the performance of passenger charters or utilize effectively even one aircraft having the capability for passenger configuration (J.A. 40).

Petitioner would fare no better with cargo charters in international air transportation, the major market for such services. Between the Pacific area and the United States, for example, where charter flights of ten thousand miles are common, the Board's 2% restriction would enable Petitioner, again using its 1964 scheduled service mileage figures, to perform less than one charter (cargo or passenger) per month.*

These egregious results of the Board's effort to "prescribe regulations" pursuant to Section 401(e)(6) should not be permitted to stand. Certainly they are not explained by the brief remark of the District Court below that: "Some mathematical formula had to be contrived in order to effectuate [the regulation's] aim. The Board used its best judgment in devising one" (J.A. 111). In truth, such a "best judgment" can be understood only on one or both of two grounds: the Board either had no real understanding of what damage it was doing to the all-cargo carriers; or the Board deliberately embarked on a course designed to withdraw the statutory rights Section 401(e)(6) of the

* It is no solace to Petitioner and two other all-cargo carriers that the Board authorized them to perform unrestricted cargo charters within the contiguous 48 states (J.A. 22). The facts of life in the air cargo industry are that there is no significant market for cargo charters within the United States because the nation is so completely served by scheduled cargo and combination carrier routes. See Comments of Petitioner to the Board in the Part 207 rule-making proceeding, March 9, 1964 (Tr. 649, 659-61).

Act granted to these carriers to perform charter services.* In either case, the Board's actions can be permitted to go without further scrutiny by this Court only at the considerable risk of undermining the economic vitality of Petitioner and the other all-cargo carriers.

C. The Board had Before It in the Rule-Making Proceeding No Information Whatsoever That Could Sustain Its Stated Basis and Purpose for Promulgating Part 207.

American Trucking Associations v. *United States*, 344 U.S. 298 (1953), makes clear that the reasonableness of an administrative agency's regulations are to be tested on judicial review in the context of the information adduced in the agency's rule-making pro-

* Nor can Part 207's destruction of the charter rights of all-cargo carriers be sustained as an effort by the Board to protect the one class of carriers who were openly singled out for favor in the rule-making proceeding—the supplemental carriers (J.A. 18-19). A fair reading of the Board's opinion indicates that a major concern of the Board was to carve out and secure the charter market for the supplemental carriers. At one point, the Board stated that "the overriding consideration is the necessity of preventing undue impairment of the opportunity of the supplementals [carriers] to develop the charter market, . . ." (J.A. 19).

In the face of the clear and indisputable purpose of Section 401(e)(6), to authorize the route carriers to conduct charter operations, there is no basis in the Aviation Act for such preferential treatment by the Board. The Board's authority under Section 416(a) of the Act to create classes of carriers (Appendix B, p. 9a below) does not in itself justify action that withdraws statutory rights from other classes of carriers. To accomplish this result lawfully, the Board must rely upon other provisions of the Act that authorize it to make substantive preferential distinctions among carriers. Neither the courts below nor the Board have cited any such independent sources of statutory authority. Surely, the 1962 amendments to the Act—which first accorded the supplemental carriers certificate rights—do not sustain such a preference for this class of carriers to the detriment of other classes of carriers.

ceeding. In passing upon the lawfulness of trip leasing regulations issued by the Interstate Commerce Commission under the Motor Carrier Act, the Court in *American Trucking* undertook to consider "the existing conditions of the motor truck industry and its regulation as developed during the Commission's hearings because only against such a background are the rules meaningful" (*id.* at p. 302). The Court accordingly reviewed the information that had been developed in the rule-making proceeding (*id.* at pp. 302-08), and concluded that "the evidence marshalled before the Commission plainly supports the conclusion that the continued effectiveness of its regulation requires the rules prescribed" (*id.* at p. 314).

Tested by the standard of *American Trucking*, Part 207 cannot be sustained. The information before the Board in the Part 207 rule-making proceeding was plainly inadequate in light of the stated "basis and purpose" of the regulation. Part 207's chief purpose, the Board's opinion discloses (J.A. 17-18), was "to assure that the certificated carriers do not place undue emphasis on charter operations in derogation of their obligation to perform adequate scheduled service." Petitioner and the other route carriers might thus have anticipated that the Board would adduce some information to substantiate that charter operations were, at the very least, threatening to interfere in some way with the scheduled services of these carriers. Such was not the case, however. Board Member Gilliland stated in dissent (J.A. 36): ". . . [I]t is to be noted that instances of carrier neglect of their 'primary role' have not been adverted to."

The striking conclusion that emerges from careful study of the more than 1600 pages of comments and

memoranda submitted in the rule-making proceeding is that the record is utterly barren of any information suggesting that the route carriers' charter services adversely affected their scheduled operations.*

Petitioner's reliance upon *American Trucking* in the courts below was to no avail. The District Court, although not referring to this Court's decision and although its views on the instant question are unclear, appeared to interpret Petitioner's challenge to the adequacy of the rule-making record before the Board as a claim that valid rule-making requires "evidence formally presented at hearings" (J.A. 110). Petitioner made no such claim. Plainly, neither *American Trucking* nor any other precedent requires such an evidentiary hearing for a rule-making proceeding.

What *is* required is some reasoned, understandable relationship between why an administrative agency says it is issuing a regulation and the information underlying its decision to take such action. The gravamen of this aspect of Petitioner's challenge to Part 207 is that no such relationship can be shown.

D. The Court Should Review in this Proceeding and in American Airlines, et al. v. Civil Aeronautics Board, No. 304 of this Term, Whether the Board May Deprive Air Carriers of Certificate Rights on the Basis of a Rule-Making Proceeding in Lieu of the Adjudicatory Hearing Section 401(g) of the Federal Aviation Act Requires.

The Court now has before it the petition for a writ of certiorari to the Court of Appeals below filed in *American Airlines, et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966 (commonly known as "the

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* As noted (p. 2, n. *), the record before the Board was available to the courts below and has been filed in this Court.

blocked space case"). The chief question presented by that petition, as we have noted (p. 10 above), parallels in significant respects the remaining question presented by this petition. That is, whether the Board, or any administrative agency, may act on the basis of a rule-making proceeding in lieu of an adjudicatory hearing to deprive common carriers holding certificates of public convenience and necessity of rights contained within their certificates.

Both Petitioner and the Board acknowledged in the Court of Appeals below that the court's *en banc* decision in the blocked space case disposed of the comparable question of administrative law and procedure presented in this case.* Moreover, the sole authority cited in the *per curiam* opinion of the court below in the instant proceeding is that court's *en banc* decision in the blocked space case. And the District Court below disposed of Petitioner's claim to an adjudicatory hearing on essentially the same reasoning as that of the Court of Appeals in the blocked space case—that no such hearing is required "if the impact of a ruling

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* See Brief for the Civil Aeronautics Board, No. 19869, U.S. App. D.C., p. 39; Reply Brief for Appellant The Flying Tiger Line Inc., No. 19869, U.S. App. D.C., p. 11. Petitioner initially urged in its brief in chief in the proceedings below that the blocked space decision of a panel of the court below, subsequently reversed by the court *en banc*, had decided in Petitioner's favor the question of whether an adjudicatory hearing was required in connection with the issuance of Part 207. Brief for Appellant The Flying Tiger Line Inc., No. 19869, U.S. App. D.C., p. 42.

or decision of the Board affects an entire class, rather [than] particular members of a group" (J.A. 109).*

Accordingly, in order to avoid burdening this Court with a duplication of the reasons for granting the writ contained in the petition filed in the blocked space case, Petitioner associates itself, for purposes of the question presented now under consideration, with the substance of the reasons set forth in that petition (at pp. 14-29) in support of the first question there presented. The authorities cited in the blocked space petition are equally compelling here. Petitioner respectfully requests the Court to treat those authorities for purposes of this case as if they are fully set forth herein.

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* Board Member Gilliland, dissenting, also treated the Board's blocked space ruling and its Part 207 determination as presenting the same question of whether an adjudicatory hearing was required (J.A. 37-38):

> "The Board cannot, in my judgment, legally juggle the rights of carriers in such fashion without an adjudicatory hearing. The fact that Part 207 is labeled rule-making is immaterial since it is well established that an agency may not change an adjudicatory matter to a rulemaking matter by the attachment of a label.
>
> * * * * * *
>
> "It appears to me that the Board has, as it did by the issuance of *Part 399, Blocked-Space Service,* August 7, 1964, attempted to delineate the roles of the combination and the all-cargo carriers to such extent as to amend basic statutory and certificate rights without hearing. The statute clearly does not permit such action. . . . Such action can only be taken under section 401(g) 'after notice and hearing.'"

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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August 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 19,869

THE FLYING TIGER LINE INC., *Appellant*

v.

CHARLES S. MURPHY, et al., as individuals and as members of the CIVIL AERONAUTICS BOARD, *Appellees*

Appeal From the United States District Court for the District of Columbia

Before: PRETTYMAN, Senior Circuit Judge, and WRIGHT and MCGOWAN, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

This court being in general agreement with the opinion filed herein by the District Court, *Flying Tiger Line, Inc.* v. *Boyd*, D.D.C., 244 F. Supp. 889 (1965), it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

See also *American Airlines, Inc., et al.* v. *Civil Aeronautics Board*, U.S. App. D.C. , F. 2d (Nos. 18833, 18834 and 18840, decided March 2, 1966) (*en banc*).

PER CURIAM.

Dated: June 2, 1966

APPENDIX B

Federal Aviation Act of 1958, 72 Stat. 731, et seq., as amended, 49 U.S.C. § 1301, et seq.

TITLE I—GENERAL PROVISIONS

DEFINITIONS

SEC. 101 [*72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. 1301*] As used in this Act, unless the context otherwise requires—

(32) "Supplemental air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in supplemental air transportation.

(33) "Supplemental air transportation" means charter trips in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d) (1) and (2) of this Act."

TITLE II—CIVIL AERONUATICS BOARD; GENERAL POWERS OF BOARD

GENERAL POWERS AND DUTIES OF THE BOARD

General Powers

SEC. 204. [*72 Stat. 743, 49 U.S.C. 1324*] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act.

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [*72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371*] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that

such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act.

Terms and Conditions of Certificate

(e)(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

(2) A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States.

(3) A certificate issued under this section to engage in supplemental air transportation shall designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the geographical area or areas within or between which service may be rendered.

(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d) (3) of this section.

(5) No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate.

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

Effective Date and Duration of Certificate

(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of

or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Additional Powers and Duties of Board With Respect to Supplemental Air Carriers

(n)(1) No certificate to engage in supplemental air transportation, and no special operating authorization described in section 417 of this title, shall be issued or remain in effect unless the applicant for such certificate or the supplemental air carrier, as the case may be, complies with regulations or orders issued by the Board governing the filing and approval of policies of insurance, in the amount prescribed by the Board, conditioned to pay, within the amount of such insurance, amounts for which such applicant or such supplemental air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the negligent operation or maintenance of aircraft under such certificate or such special operating authorization.

(2) In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

(3) If any service authorized by a certificate to engage in supplemental air transportation is not performed to the minimum extent prescribed by the Board, it may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(4) The requirement that each applicant for a certificate to engage in supplemental air transportation must be found to be fit, willing, and able properly to perform the transportation covered by his application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board under this Act, shall be a continuing requirement applicable to each supplemental air carrier with respect to the transportation authorized by, and currently furnished or proposed to be furnished under, such carrier's certificate. The Board shall by order, entered after notice and hearing, modify, suspend, or revoke such certificate, in whole or in part, for failure of such carrier (A) to comply with the continuing requirement that such carrier be so fit, willing, and able, or (B) to file such reports as the Board may deem necessary to determine whether such carrier is so fit, willing, and able.

(5) In any case in which the Board determines that the failure of a supplemental air carrier to comply with the provisions of paragraph (1), (3), or (4) of this subsection, or regulations or orders of the Board thereunder, requires, in the interest of the rights, welfare, or safety of the public, immediate suspension of such carrier's certificate, the Board shall suspend such certificate, in whole or in part, without notice or hearing, for not more than thirty days. The Board shall immediately enter upon a hearing to determine whether such certificate should be modified, suspended, or revoked and, pending the completion of such hearing, the Board may further suspend such certificate for additional periods aggregating not more than sixty days. If the Board determines that a carrier whose certificate is suspended under this paragraph comes into compliance with the provisions of paragraphs (1), (3), and (4) of this subsection, and regulations and orders of the Board thereunder, the Board may immediately terminate the suspension of such certificate and any pending proceeding commenced under this paragraph, but nothing in this sentence shall preclude the Board from imposing on such carrier a

civil penalty for any violation of such provisions, regulations, or orders.

(6) The Board shall prescribe such regulations and issue such orders as may be necessary to carry out the provisions of this subsection.

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416. [*72 Stat. 771, 49 U.S.C. 1386*] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (k) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transporation, and (B), to the extent that the operations of such air carrier are conducted during daylight

hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its developement and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

TITLE X PROCEDURE

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

SEC. 1006. [*72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486*] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Civil Aeronautics Act of 1938, 52 Stat. 973 (superseded by Federal Aviation Act of 1958, supra)

§ 401

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require . . . . Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

Motor Carrier Act (Part II of the Interstate Commerce Act), 54 Stat. 919, 49 U.S.C. 301

§ 308

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1001

Rule Making

SEC. 4. [*60 Stat. 238; 5 U.S.C. 1003*] Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

* * * * *

Procedures

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

* * * * *

ADJUDICATION

SEC. 5. [*60 Stat. 239; 5 U.S.C. 1004*] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. . . .

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for . . . hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * *

HEARINGS

SEC. 7. [*60 Stat. 241; 5 U.S.C. 1006*] In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members

of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; . . .

* * * * * *

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. [*60 Stat. 242; 5 U.S.C. 1007*] In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. . . .

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such findings, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall became a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 508

THE FLYING TIGER LINE, INC., PETITIONER

v.

CHARLES S. MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A. 1a) is not yet reported. The opinion of the district court is reported at 244 F. Supp. 889, and is reprinted in the Joint Appendix printed for the use of the court of appeals (J.A. 105–111).[1]

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1966. The petition for a writ of certiorari was filed on August 31, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Nine copies of this Joint Appendix have been filed with the Court. "J.A." citations refer to this document.

QUESTIONS PRESENTED

1. Whether the Federal Aviation Act authorizes the Civil Aeronautics Board to prescribe regulations restricting the passenger charter operations of all-cargo air carriers.

2. Whether the Civil Aeronautics Board's regulations governing such charter operations are reasonable.

3. Whether the Civil Aeronautics Board was required to hold an adjudicatory hearing prior to promulgating the challenged regulations.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Aviation Act are set forth in Appendix B to the petition for certiorari. The relevant regulations are set forth in the appendix to this brief (*infra*, pp. 13–16).

STATEMENT

Under the Federal Aviation Act (49 U.S.C. 1301 *et seq.*), air carriers are prohibited from engaging in "any air transportation unless there is in force a certificate" of public convenience and necessity, or other authorization, issued by the Civil Aeronautics Board ("the Board") allowing the carrier to engage in such transportation (49 U.S.C. 1371(a)). The certificates of regular route carriers, such as petitioner, designate both the geographic points between which the carrier is authorized to fly and the type of service the carrier may provide. With respect to the type of service provisions, two broad categories have been recognized. Some certificates authorize the carriage of passengers, property and mail; holders of such certificates are called "combination carriers." Other certificates, held

by the so-called "all-cargo carriers," authorize the carriage of property and mail but not of passengers. The distinction between combination and all-cargo carriers has been recognized for regulatory purposes ever since the Board certified a group of carriers to serve as specialists in air-cargo service some twenty years ago.[2] Petitioner has been an all-cargo carrier under a certificate initially granted in 1949, renewed in 1956 and made permanent in 1962 (J.A. 44).

Under their certificates, both combination and all-cargo carriers can engage in both scheduled and charter flights between the points and of the type designated in their respective certificates. In addition, prior to 1962, Section 401(e) of the Federal Aviation Act,[3] authorized both types of carriers to "make charter trips * * * without regard to the points named in [their] certificate[s], under regulations prescribed by the Board." Thus, under Section 401(e), combination carriers could make charter combination flights, and all-cargo carriers, such as petitioner, could make charter cargo flights between points other than those designated in their respective certificates, subject to Board regulation. Section 401(e) did not, however, authorize all-cargo carriers to make charter passenger flights. See *Flying Tiger Line, Inc.* v. *Civil Aero-*

[2] *Air Freight Case*, 10 C.A.B. 572, affirmed *sub nom. American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.). The history of the all-cargo industry is traced in *Domestic Cargo-Mail Service Case*, 36 C.A.B. 344, 352–355.

[3] Section 401(e) of the Federal Aviation Act of 1958 reenacted without change the provisions of Section 401(f) of the Civil Aeronautics Act of 1938 (52 Stat. 987, 988–989).

nautics Board, 204 F. 2d 404 (C.A. D.C.).[4] Pursuant to its authority to regulate charter flights under Section 401(e), in 1951 the Board adopted a variety of regulations designed to limit the volume of the off-route chartering in which the combination and all-cargo carriers engaged (see 14 C.F.R. 207 (1952 rev.)) in order to encourage concentration on the development of service on the certificated routes. Most significantly, the Board limited each carrier's off-route charter flights under Section 401(e) in each calendar quarter to 2½ percent of the revenue plane miles flown in scheduled service during the preceding 12 months (see J.A. 16).

In 1962 Congress amended Section 401(e) of the Federal Aviation Act (76 Stat. 143) so as to permit carriers to engage in charter service "without regard to * * * the type of service" designated in their certificates as well as "without regard to the points named" in their certificates, subject to regulations prescribed by the Board.[5] As amended, Section 401(e)(6) (49 U.S.C. 1371(e)(6)) provides:

> Any air carrier, *other than a supplemental air carrier,* may perform charter trips or any other special service, without regard to the points named in its certificate, *or the type of service*

[4] Any passenger charters that were performed by all-cargo carriers, such as petitioner, were authorized by exemption order issued by the Board pursuant to Section 416(b). While the Board has given no indication that it intends to grant such exemptions as a matter of course, the present regulations do not preclude the issuance of exemption orders by the Board for passenger charters.

[5] See H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969) pp. 12–13.

provided therein, under regulations prescribed by the Board. [New material in italics.]

In November 1962, in light of the amendment of Section 401(e), the Board instituted rule-making proceedings for the purpose of revising its regulations thereunder. The Board issued a notice of proposed rule-making and invited comment from the air carriers as to revision of the regulations (27 F.R. 11322); later, comments were solicited from the carriers on specific proposals for the revision of the regulations (29 F.R. 1476). The carriers were given the opportunity to present oral argument to the Board (29 F.R. 8121); and finally, on September 18, 1964, the Board adopted the present regulations (29 F.R. 13246; 14 C.F.R. § 207 (1966 rev.)) which petitioner challenges here.[6]

The revised Part 207 Regulations, like their predecessors, limit the volume of charter operations that a carrier can conduct under Section 401(e)(6); the regulations do not restrict charter flights conducted within the terms of a carrier's certificate—that is, between the points and of the type designated in its certificate. The regulations provide that, after January 1, 1965, neither a combination carrier (14 C.F.R. § 207.5) nor an all-cargo carrier (14 C.F.R. § 207.6)

[6] The Board issued a statement, when it promulgated the regulations, containing a lengthy and detailed explanation of the basis for, and purpose of, the revised regulations (J.A. 15–30). The Board noted that the primary function of certificated carriers was to serve their authorized routes with scheduled service and that restrictions had been adopted to restrain the carriers from placing undue emphasis upon charter operations thereby prejudicing their capacity to meet their obligation to provide adequate scheduled service (J.A. 17, 22).

may "during any calendar year perform off-route charter trips which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year." As used here, the term "off-route charter trip" encompasses any charter trip for which authority is derived from Section 401(e)(6), rather than from a carrier's certificate, either because the trip is not between certificated points or not of the certificated type of service or both (14 C.F.R. § 207.6). Thus, a passenger charter by an all-cargo carrier is deemed "off-route" whether or not it is between points for which the carrier is certificated to provide cargo service. The restrictions do not apply to military charters, which, the Board noted, constituted "the great bulk" of the all-cargo carriers' charter operations (J.A. 23). Furthermore, each all-cargo carrier is exempted from the two percent limitation with respect to off-route cargo charters within its "area of operations"; petitioner's area of operations embraces the 48 contiguous States (14 C.F.R. § 207.6). Thus, the principal practical effect of the regulations, insofar as all-cargo carriers are concerned, is to limit civilian passenger charter service to two percent of certificated revenue miles.

Petitioner, the only all-cargo carrier whose civilian passenger charter operations exceeded the two percent limitation (see J.A. 23, n. 3), challenged the validity of Part 207 in the district court and sought injunctive and declaratory relief. The district court dismissed the complaint, holding that the Board had not exceeded its statutory authority, that the regulations

were not discriminatory, and that it was not necessary for the Board to conduct an adjudicatory proceeding prior to their adoption (J.A. 109–110). The court of appeals affirmed *per curiam* (Pet. App. A 1a).

ARGUMENT

1. Contrary to petitioner's suggestion that this litigation is of general importance to the air transport industry (Pet. 5, 20), the only members of the industry whose operations are immediately affected by the regulations are two combination carriers. (Trans Caribbean Airlines, Inc. and Mackey Airlines, Inc.) (J.A. 21), and petitioner (J.A. 23). And as to petitioner, whose certificate contemplates only the carriage of cargo, the effect is limited to one subsidiary aspect of its operation, *i.e.*, civilian passenger charter flights.[7] Thus, this case does not present an issue of general significance warranting review by this Court.

2. Furthermore, the issues raised in the petition lack merit. The very wording of Section 401(e)(6) indicates an intent to give the Board the authority to limit, by regulation, any charter service authorized

[7] Petitioner's prediction, in its amended complaint (filed October 20, 1964) (J.A. 11) and reiterated in its petition (Pet. 9, 20), that the two percent limitation would imperil its "economic survival in the immediate future," is not borne out by data filed with the Board. It appears from those data that, for the 12 months preceding the effective date of the new regulations (January 1, 1965) petitioner had operating revenues of $45,468,000, an operating profit of $4,005,000 and a return on total investment of 7.59 percent. For the 12 months following the effective date of the regulations petitioner enjoyed operating revenues of $56,156,000, an operating profit of $8,820,000, and a return on total investment of 10.71 percent. See Civil Aeronautics Board, *Air Carrier Financial Statistics*. Under 14 C.F.R. § 302.24(m), the Board takes official notice of these statistics.

by that section, and the legislative history of the 1962 amendment resolves any doubts as to the congressional purpose and intent. Prior to 1962 it was settled that all-cargo carriers, such as petitioner, were not authorized (except by special exemption granted by the Board) to engage in civilian passenger charter service.[8] The 1962 amendment is fully explained in the House conference report (H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969), p. 13):

> This amendment will permit the Board to authorize cargo carriers to engage in passenger charter operations to the extent that it may find, from time to time, that the public interest so requires. * * * [T]he Board will have the necessary flexibility to limit *frequency of service* and to impose such other limitations, conditions, and restrictions as the public interest may require. [Emphasis added.]

The authority of the Board to restrict charter flights authorized under Section 401(e)(6) was thus retained by the 1962 amendment notwithstanding the Board's well established practice of restricting such operations to a percentage of scheduled operations (see, *supra*, p. 4). There is, therefore, no reason to suppose that Congress did not anticipate the promulgation of the very type of regulations that the Board has adopted.

3. Petitioner's contention, that the Board's regulations discriminate against the all-cargo carriers in favor of the combination carrier, is also without merit. The regulations provide the same two percent limita-

[8] *Flying Tiger Line, Inc.* v. *Civil Aeronautics Board*, 204 F. 2d 404 (C.A. D.C.).

tion for combination carriers as for all-cargo carriers. Compare 14 C.F.R. 207.5(b) with 14 C.F.R. 207.6(b).

Petitioner contends, however, that the regulations discriminate by permitting the combination carriers to engage in passenger charters over their certificated routes, without limitation, while restricting passenger charters by all-cargo carriers over their certificated routes (Pet. 13–14). The complete answer to this contention is that the combination carriers' authority to provide on-route passenger charters comes from the carriers' certificates, issued pursuant to Section 401 (d)(1), and not from Section 401(e)(6), which is limited to providing authority for charters beyond the scope of a carrier's certificate (H. Conf. Rep. No. 1950, 87th Cong., 2d Sess. (S. 1969), p. 12; 108 Cong. Rec. 12318). Thus, the authority of combination carriers to engage in passenger charters between the cities they serve is based upon their certificates to engage in regular passenger service, just as the all-cargo carriers may engage in unrestricted cargo charter service between the cities they serve. The difference in authority to operate such "on-route" charters is based upon the fundamental difference in the certificates between combination and all-cargo carriers.[9]

[9] Petitioner points out (Pet. 17–18) that, subsequent to passage of the 1962 amendment, Senator Engle of California, a Conference Committee member, in the proceedings which led to the regulations in dispute here, disputed the existence of a distinction in Section 401(e)(6) between off-route and on-route charters (J.A. 69–74). While we strongly doubt the probativeness of such post-enactment legislative "history," we note that Senator Cotton of New Hampshire, another member of the Conference Committee, in a letter to the Board, reaffirmed the existence of that distinction (J.A. 103–104).

4. Petitioner also contends that the regulations are invalid because the Board did not hold an adjudicatory proceeding to establish the need for the two percent limit (Pet. 22–26).[10] But the regulations objected to are clearly within the normal scope of agency rule-making. They were adopted after protracted proceedings in which all interested parties were invited to participate, they are general in application and prescriptive in character. The reasons for their adoption, spelled out in the Board's memorandum (J.A. 15–30), relate to the future growth and development of the industry. It is well settled that general rules or regulations of this kind, though they may adversely affect members of a regulated industry, need not be preceded by an adjudicatory proceeding or supported by an evidentiary record. See, *e.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–204; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 39–45; 2 Davis, *Administrative Law*, § 15.03, p. 353. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190.[11]

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[10] A similar contention was presented and rejected in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624 (C.A.D.C.), certiorari denied, October 10, 1966 (No. 304, this Term).

[11] In urging that an evidentiary record was needed to support the two percent off-route charter limitation, petitioner relies heavily on *American Trucking Associations* v. *United States*, 344 U.S. 298 (Pet. 22–24). Such reliance is misplaced. To be sure, evidentiary hearings were held by the Interstate Commerce Commission prior to its adoption of the challenged regulations, and this Court did rely on evidence adduced at those hearings in demonstrating that the regulations had a rational basis. But this Court specifically noted that the agency was not required to hold evidentiary hearings: 344

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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OCTOBER 1966.

U.S. at 320. The Court did not indicate in any way that, had such hearings not been held, it would have declared the regulations invalid.

APPENDIX

Part 207 of the Civil Aeronautics Board Regulations, 14 C.F.R. 207 (1966 rev.), provides in pertinent part:

§ 207.1 Definitions.

* * * * *

"All-cargo carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to section 401(d) (1) or (2), which authorizes the carriage of property only or property and mail only.

* * * * *

"Charter trip" means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis:

(1) By a person for his own use,

(2) By a person (no part of whose business is the formation of groups for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons as agent or representative of such group,

(3) By two or more persons acting jointly for the transportation of such group of persons, or their property,

(4) By an air freight forwarder holding a currently effective letter of registration issued under Part 296 or Part 297 of this subchapter for the carriage of property in air transportation.

* * * * *

"Combination carrier" means an air carrier holding a certificate of public convenience and necessity issued pursuant to section 401(d) (1) or (2) which authorizes the carriage of persons, property and mail or persons and property only.

* * * * *

"On-route" shall refer to service performed by an air carrier between points between which said carrier is authorized to provide service pursuant to either its certificate of public convenience and necessity or exemption authority: *Provided, however,* That passenger charter trips by any all-cargo carrier are not considered to be on-route whether or not they are performed between points designated to receive service by such carrier in its certificate of public convenience and necessity, except that in the event services are performed pursuant to a contract with the Department of Defense *or* an agency thereof, by an all-cargo carrier between points designated to receive service by such carrier in its certificate of public convenience and necessity which (1) involves cargo transportation in one direction and passenger transportation in the other direction or (2) involves a mixed charter, the passenger charter leg or the mileage operated in the mixed charter, as the case may be, will be considered on-route. "Off-route" shall refer to any charter except those performed for the Department of Defense which is not on-route.

* * * * *

§ 207.5 Limitation on amount of charter trips which may be performed by combination carriers.

(a) Prior to January 1, 1965, a combination carrier shall not during any calendar quarter perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed 2½ percent of the revenue plane miles flown by it in scheduled air transportation during the preceding 12-month period.

(b) Effective January 1, 1965, a combination carrier shall not during any calendar year perform off-route charter trips which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year.

§ 207.6 All-cargo carriers; limitation on amount of charter trips which may be performed.

(a) Prior to January 1, 1965, an all-cargo carrier shall not during any calendar quarter perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed 2½ percent of the revenue plane miles flown by it in scheduled air transportation during the preceding 12-month period: *Provided, however,* That an all-cargo carrier shall be permitted to perform off-route cargo charters within its area of operations without any limitation as to volume of service.

(b) Effective January 1, 1965, an all-cargo carrier shall not during any calendar year perform off-route charters which in the aggregate, on a revenue plane-mile basis, exceed two percent of the base revenue plane miles flown by it during the preceding calendar year: *Provided, however,* That an all-cargo carrier shall be permitted to perform off-route cargo charters within its area of operations without any limitation as to volume of service.

(c) Within the meaning of paragraphs (a) and (b) of this section, the areas of operations of the all-cargo carriers are the following:

(1) Within the 48 contiguous States—Slick Airways, Inc.; Flying Tiger Line, Inc.; and Airlift International, Inc.

(2) Between the 48 contiguous States and Europe—Seaboard World Airlines, Inc.

(3) Between the 48 contiguous States and Puerto Rico—Airlift International, Inc.

(4) Between the 48 contiguous States on the one hand and the Caribbean, Central and South America on the other hand—Aerovias Sud Americana, Inc.

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Petitioner,

—v.—

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—and—

TRANS WORLD AIRLINES, INC.,

Respondents.

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO CERTIORARI

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BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO CERTIORARI

Question Presented

Whether regulations adopted by the Civil Aeronautics Board validly define and limit charter services to be performed by air carriers holding route certificates, when the statute provides that such services may be performed "under regulations prescribed by the Board."

Statement

The opinion and decision of the District Court, 244 F. Supp. 889 (D. D. C. 1965), and *per curiam* affirmance by the United States Court of Appeals for the District of Columbia Circuit (Petition, Appendix A, p. 1a) uphold the validity of regulations adopted in rule-making proceedings of the Civil Aeronautics Board in so far as they limit the passenger charter operations of Petitioner, The Flying Tiger Line Inc.

Petitioner is the holder of a certificate of public convenience and necessity authorizing it to engage in air transportation over regular routes carrying property and mail—but not passengers. This certificate makes no provision concerning charter trips, or for carriage of traffic other than property and mail; any authority to perform passenger charter services is based solely on Section 401 (e)(6) of the Federal Aviation Act of 1958, as amended (49 U. S. C. §1301 et seq.).

Section 401(e)(6) provides that an air carrier holding a route certificate may perform charter trips, without regard to the points named in its certificate, or the type of service provided therein, "under regulations prescribed by the Board." Section 401(e)(6) originally authorized the holder of a certificate to perform such operations "without regard to the points named in its certificate, under regulations prescribed by the Board." The 1962 amendment of the statute inserted the words "or the type of service provided therein" following the word "certificate".

Regulations adopted by the Board pursuant to this statutory power limit the quantity of charter trips and special services, which are authorized under Section 401(e)(6).

In adopting amended regulations to correspond with amended Section 401(e)(6) the Board used the expression "off-route" to describe the charter services over which it was exercising its regulatory authority and defined this term as including any passenger charter trips by holders of certificates which do not authorize the carriage of passengers. Thus the Board pursuant to Section 401(e)(6) authorized Petitioner to conduct passenger charter operations, a right that it did not have under its certificate, but limited the quantity of such operations to be performed as it did other "off-route" charters.

Petitioner attacked the validity of these regulations in a suit for a declaratory judgment and an injunction, contending that the distinction drawn by the regulations between "on-route" and "off-route" services of all-cargo carriers is invalid. TWA was permitted to intervene.

ARGUMENT

What appear to have been the Petitioner's principal arguments for the granting of the writ were the pendency of a petition for certiorari in another case arising out of the same administrative rule-making proceeding (*American Airlines, Inc. et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966) and some of the identical arguments there advanced which were adopted by Petitioner (Petition, pp. 10-11, 24-26). Since the present petition was filed, the petition in No. 304 has been denied by the Court (see page 6 of this brief). Consequently, Petitioner is left solely with a reargument of matters raised before the Board, the District Court and the Court of Appeals. The decisions of the Board and the courts below were clearly correct. Moreover, Petitioner has made no showing that

there is any important Federal question for this Court to consider.

A. *No Problem Affecting Rights Under Petitioner's Certificate Is Presented.*

Petitioner's certificate of public convenience and necessity is not the source of authority to operate passenger charter trips or any other passenger services. It contains no reference to such services. Any authority Petitioner has to perform these services can come only from the statute—and the only section it can refer to is Section 401(e)(6).

The Petitioner asserts that its statutory rights to operate passenger charter trips were unduly restricted by the formula limiting the volume of such trips; but it disregards both the statute and its certificate by further asserting that any such rights are "incorporated into" or "contained within" its certificate (*cf.*, Petition, p. 3 and p. 25). No question of modification or amendment of Petitioner's certificate is here involved. The sole question below was whether regulations prescribed by the Board pursuant to the statute are valid. The decision was simply that the Board did not exceed its statutory power in prescribing the regulations.

Petitioner has two kinds of operating rights: (1) to carry property and mail under its certificate, and (2) to operate charter or special flights pursuant to Section 401 (e)(6) without regard to its certificate but *under regulations prescribed by the Board.* Only the latter operations are here involved. Petitioner's certificate does not even mention passenger operations of any kind and it has authority to conduct passenger operations in charters only by virtue of Section 401(e)(6).

Board regulation of Petitioner's non-certificated passenger charter services is authorized by the statute.*

B. *Claims That the Regulations Discriminate Against All-Cargo Carriers Were Properly Overruled.*

Petitioner claims that the regulations discriminate against all-cargo carriers and in favor of combination carriers. This is not the case.

Combination carriers are authorized to carry passengers (as well as property and mail) under their certificates; all-cargo carriers are not so authorized. This difference exists entirely apart from Section 401(e)(6) and the regulations under it. It results from the certificate authorizations sought by the respective carriers and issued by the Board. The regulations under Section 401(e)(6) recognize and take account of this difference. They do not create it.

The regulations here in question relaxed the distinction between the two types of carriers by allowing the all-cargo carriers to operate passenger charters and special services, but limited the quantity of such non-certificated services. The quantity of non-certificated or "off-route" services of combination carriers is similarly limited by the regulations.

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* Petitioner's entire argument is really based on its claim that its passenger charter operations are not "off-route" and that the Board therefore should not include them in its definition of "off-route". This puts form above substance. It is not important whether Petitioner's passenger operations are "off-route" in the dictionary sense. This term itself is not used in the statute and is used in the regulations as a defined term only. If literally descriptive labels were thought necessary, the Board could have used such words as "non-certificated" or "otherwise unauthorized" to designate the services authorized under Section 401(e)(6) and which it was regulating thereunder. The substance of the regulations would not have been changed. Problems of semantics or choice of apt labels raise no important Federal question.

Petitioner's further contention that the particular limitation on the volume of its passenger charter operations contained in the regulations unduly restricts such operations (and that it is "arbitrary and capricious") is an effort to induce the courts to substitute their judgment for the discretion exercised by the Board. The Board's action is properly upheld by the decision below because it is warranted by the record and has a reasonable basis in the law. *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 153-154 (1946); *NLRB* v. *Hearst Publications,* 322 U. S. 111, 130-131 (1944); *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939).

C. *Denial of the Petition in No. 304 This Term Disposes of Other Contentions in the Present Case.*

The Petition asserts that its contentions concerning administrative law and procedure parallel those of the petition in *American Airlines, Inc., et al.* v. *Civil Aeronautics Board,* No. 304, October Term, 1966 (commonly known as "the blocked space case"). This Court denied the petition for a writ of certiorari in No. 304 on September 10, 1966.

The contentions of the present Petition are far less compelling than those in No. 304, because, as pointed out above, the present case involves no amendment or modification of certificate rights. Denial of the petition in No. 304 *a fortiori* disposes of the same contentions which this Petitioner purported to adopt.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 508

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CHARLES S. MURPHY, ET AL., as individuals and as members of the CIVIL AERONAUTICS BOARD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondents' Brief in Opposition highlights the question of law underlying Petitioner's request that the writ of certiorari be granted. That question, which largely controls the validity of all that the Civil Aeronautics Board has done with its charter regulations ("Part 207"), is whether Section 401(e)(6) of the Federal Aviation Act constitutes the route carriers' sole authority for charter operations or whether a separate charter authority derives from the carriers' cer-

tificates as well. Petition, pp. 12-13; Resp. Brief, pp. 6, 9.* The answer requires the resolution of important issues affecting the conduct of charter operations by the route carriers that the Petition presents (pp. 14-21) but that Respondents have refused to confront. These issues of statutory construction and judicial precedent, and of the Board's authority to withhold air carrier operating rights that Congress granted, should be conclusively settled by this Court.

2. Respondents have not only failed to contest the arguments advanced to sustain Petitioner's reading of Section 401(e)(6) as the sole source of charter authority (Petition, pp. 14-18). In their desire to minimize the significance of this proceeding for the regulation of competition in charter services between the cargo and combination carriers, they have also mistakenly confined the application and effect of Part 207 in important respects:

(a) Respondents incorrectly state (Brief, pp. 6-7) that the principal adverse impact of Part 207 is limited to the cargo carriers' civilian passenger charter operations. Indeed, Respondents frame their first Question Presented so that Part 207 would appear to embrace only "passenger charter operations" (p. 2).

Part 207, however, clearly prohibits cargo charters *as well as* passenger charters in excess of the 2%-of-revenue-miles restriction anywhere outside of each cargo carrier's so-called "area of operations." Respondents thus neglect the fact that: large areas of the world, including the important Pacific Ocean area, are not within any of the designated areas of operations

* See also Brief in Opposition for Intervenor-Respondent Trans World Airlines, p. 5.

and thus fall within the 2% restriction; Petitioner's "area of operations," the contiguous 48 states, is not a fruitful market for cargo-charters; and the Board's 2% restriction on cargo charters in effect totally destroys the capability of the cargo carriers to perform even these charters (see Petition, pp. 8, 21 and n. *).

It is evident from these considerations that this proceeding involves far more than the scope of the authority of the cargo carriers to perform civilian passenger charters, although Petitioner believes that the need to resolve this controversy alone would suffice for the writ to issue.

(b) Citing financial statistics on Petitioner's recent operations, Respondents conclude (Brief, p. 7 n. 7) that charter operations are not of major economic importance to the cargo carriers.

This conclusion is incorrect. Respondents forget that almost all of the increase in Petitioner's operating revenue during the periods cited derived from Petitioner's military charters in connection with the Vietnam War.* Respondents surely would not encourage Petitioner and the other cargo carriers to rely upon this source for the supplemental revenue that

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* For the calendar years 1964 and 1965 covered in Respondents' Brief (p. 7 n. 7), the same source (C.A.B. Air Carrier Financial Statistics) discloses that $24,415,000 and $34,889,000, respectively, represented operating revenues from military charters out of Petitioner's total operating revenues of $45,468,000 and $56,156,000 in each of those years. Of the $10,688,000 total increase in operating revenues from 1964 to 1965, $10,474,000 (or 98%) derived from the increase in military charters. Without such increased military charter revenue during 1965 resulting directly from the Vietnam War, the adverse effect of the Board's restrictions on the charter operations of Petitioner and the other all-cargo carriers might well have been clearly displayed in their financial statistics.

their scheduled cargo services demand. For many years to come, as in the past, the all-cargo carriers can look only to commercial charter operations on a world-wide basis for such badly needed additional income.

(c) Respondents would have it appear that this proceeding is of limited importance because, they assert (Brief, p. 7), only the charter operations of two combination carriers and of Petitioner were "immediately affected" by Part 207.

This statement ignores the realities of the record before the Board in the rule-making proceeding. That record amply demonstrated that the 2% restriction imposed by Part 207 on "off-route" charters would severely hamper future growth of charter operations by many combination carriers, particularly the smaller local-service companies, as well as by the all-cargo carriers (see J. A. 62-63).* Furthermore, the Board's 2% restriction will not have the same adverse impact on the larger combination carriers as it promises to have on the all-cargo carriers because the former typically have enormous scheduled service passenger revenue-miles against which they will be able to apply the 2% restriction. Finally, the record before the Board showed that Airlift International, another of the four all-cargo carriers, was "immediately affected" by the 2% restriction, as Respondents have previously acknowledged (J.A. 101 n. 26). Contrary to what Respondents urge, therefore, it would seem that a broad cross-section of the combination carriers as well as two of the

* "Tr." references at J.A. 62-63 are to the five-volume record made before the Board in the rule-making proceeding that resulted in the issuance of Part 207, a certified copy of which has been filed with this Court.

four certificated all-cargo carriers (Petitioner and Airlift) objected to the 2% restriction.

(3) Respondents misconstrue Petitioner's reliance upon *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). They cite that decision, along with others (Brief, p. 10 and n. 11), for the proposition that an "evidentiary hearing" (or an "adjudicatory proceeding") is not needed to validate a regulation of general applicability such as Part 207.

But petitioner expressly disavowed reliance on *American Trucking* or any other precedent as requiring "an evidentiary hearing for a rule-making proceeding" (Petition, p. 24). *American Trucking*, Petitioner believed, required instead that *some* information of *some* probative worth must have been adduced in the administrative agency's rule-making proceeding to sustain the reasonableness of the regulation promulgated. See Petition, pp. 22-24. Petitioner holds to that view, for on this wholly independent issue Respondents are mute.

And for good reason! There was no such information before the Board in the rule-making proceeding.* In short, Respondents would have the Court refrain from reviewing an administrative regulation of sweeping import and crushing economic impact for an important regulated industry, that was promulgated after a rule-making proceeding whose record contained not one piece of information justifying the agency's stated need for the rule—to restrain the route carriers from

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* Intervenor-Respondent Trans World Airlines states simply that the passenger charter restrictions of Part 207 are "warranted by the record" and have a "reasonable basis in law" (Brief, p. 6), but cites to nothing in the record before the Board.

unduly emphasizing charters and "thereby prejudicing their capacity to . . . provide adequate scheduled service" (Resp. Brief, p. 5 n. 6). And see J.A. 17-18.

Petitioner respectfully suggests that Respondents' reference to *American Trucking* in treating the need for an "adjudicatory proceeding" (an issue that the Court disposed of by denying certiorari in *American Airlines, et al.* v. *C.A.B.*, No. 304, this Term) masks Respondents' inability to overcome the direct application of *American Trucking* to the instant proceeding.

CONCLUSION

For the reasons set forth above and in the Petition, the writ of certiorari should issue.

Respectfully submitted,

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